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IN THE
Supreme Court of the United States

October Term, 1978

No. ~~78~~-151

RALPH E. MUELLER AND EUGENE D. DEVANE,
Petitioners,

vs.

HUBBARD MILLING COMPANY,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The Petitioners, Ralph E. Mueller and Eugene D. Devane, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on April 10, 1978.

I.

CITATIONS TO OPINIONS BELOW

The relevant Memorandum and Order of the District Court, dated April 15, 1977, is not reported; it is set forth as Appendix A. The opinion of the Court of Appeals is reported at 573 F. 2d 1029 (8th Cir. 1978); it is

set forth as Appendix B. The judgment of the Court of Appeals for the Eighth Circuit and that Court's order denying plaintiffs' timely petition for rehearing are set forth as, respectively, Appendix C and Appendix D.

II.

JURISDICTION

The District Court entered judgments pursuant to jury verdicts on March 4, 1977. The Court of Appeals vacated those judgments on April 10, 1978. Plaintiffs' petition for rehearing, filed April 24, 1978, was denied by the Court of Appeals on May 2, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

III.

QUESTIONS PRESENTED

This Petition presents the following questions:

1. Whether in substituting its judgment as to the integrity of the jurors for that of a trial judge, the Court of Appeals in effect deprived petitioners of their right to trial by jury in contravention of the Seventh Amendment, contrary to the law in other circuits, contrary to the accepted and usual course of judicial proceedings, and contrary to Rule 52(a), *Federal Rules of Civil Procedure*.

2. Whether the decision of the Court of Appeals to vacate judgments for a choice of law issue never raised, argued, or briefed before either the District Court or the Court of Appeals conflicts with decisions of other Courts of Appeals and represents a substantial departure from the accepted and usual course of judicial proceedings.

3. Whether the action of the Court of Appeals in disputing the jurors' resolution of credibility issues conflicts with decisions in other circuits and constitutes a substantial departure from accepted judicial practice.

IV.

CONSTITUTIONAL PROVISION AND RULE OF PROCEDURE INVOLVED

The *United States Constitution, Amendment VII*, provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rule 52(a), *Federal Rules of Civil Procedure*, provides in relevant part:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

V.

STATEMENT OF THE CASE

Trial of this case involved a number of sharp factual disputes. Verdicts for plaintiffs reflected the jurors' belief that plaintiffs' testimony was credible, while that of respondent's principal witness was not. The issues raised on appeal were once again basically those of credibility

and integrity, this time of the jurors themselves, as well as the witnesses. The judgment of the Court of Appeals, contrary to that of the district court, was that the jurors acted improperly and that testimony of plaintiffs, particularly Ralph Mueller, was not credible.

This case raises fundamental issues as to the proper role of a Court of Appeals in reviewing jury verdicts. The opinion of the Court of Appeals conflicts with decisions of other circuits on the propriety of granting new trials in jury cases and on the propriety of considering a choice of law issue never raised, argued or briefed at the district court or Court of Appeals level. In ordering a new trial, despite the trial judge's contrary decision and finding of no jury misconduct, the decision represents a new and startling departure from the long accepted rules and traditions of our judicial system.

A. Procedural Statement.

This case involves two limited partnerships in the feeder cattle business, known as Dakota 14 and Dakota 16. Defendant/respondent Hubbard Milling Company ("Hubbard") was sole general partner; plaintiffs/petitioners Ralph E. Mueller and Eugene D. Devane were limited partners. The parties were involved in eight such limited partnerships, of which Dakota 14 and Dakota 16 were the last two. Plaintiffs experienced mixed success with these partnerships, and, in the aggregate had already sustained substantial losses prior to the events underlying this litigation. In both Dakota 14 and Dakota 16 they suffered additional losses in the hundreds of thousands of dollars.

The case involved four theories of liability, each relating to the same set of facts: federal securities law viola-

tions, common law fraud, breach of contract, and breach of fiduciary duty.¹ Hubbard demanded a jury trial. After a trial lasting between six and seven days, and after deliberating another day and a half, the jury returned verdicts in favor of Mueller and Devane as follows: Dakota 14, Mueller, \$58,389; Dakota 14, Devane, \$23,154; Dakota 16, Mueller, \$334,700 "plus damages of \$51,000"; and Dakota 16, Devane, \$62,595 "plus damages of \$9,000."

The verdicts relating to Dakota 14 were less than half the maximum damages shown (A-3). Those on Dakota 16 exceeded the amounts Mueller and Devane had invested in those partnerships.

Hubbard moved for judgment notwithstanding the verdicts or, in the alternative, for a new trial. The trial court (Honorable Earl R. Larson) denied the request for judgment n.o.v. The motion for a new trial was also denied as to Dakota 14, but granted as to Dakota 16, unless plaintiffs agreed to remit all damages above the amounts invested in Dakota 16 (\$219,300 for Mueller and \$38,700 for Devane). In so ruling, Judge Larson rejected Hubbard's contention that the verdicts were the result of passion and prejudice. Instead, he found the case had been "tried fairly" (A-3). As to the excessive size of the Dakota 16 verdicts, the Court found, "[T]he mistake appears to be an honest one which can be corrected by remittitur" A-3). Mueller and Devane did consent to remittitur. Hubbard appealed.

The Court of Appeals vacated all four judgments and remanded for a new trial. The Court cited two bases for its decision. First, the verdicts were tainted, the Appellate

¹Federal jurisdiction exists because of diverse citizenship and because of federal securities act claims. 28 U.S.C. § 1332 and U.S.C. § 77v and 78aa.

Court held, by "passion" and "prejudice". "We do not agree," the Court declared, with the trial court's finding that the verdicts were sound (A-29).

Second, the Court of Appeals held the verdicts to be supported by parol evidence which under South Dakota law was inadmissible. Hubbard had objected to the admission of certain parol evidence, but had submitted the question to the trial court under Minnesota law, not South Dakota law (Tr. 57-58). At trial, in both oral and written submissions; upon motion for new trial; and on appeal, Hubbard consistently presented the parol evidence issue as a matter of Minnesota law. Despite the absence of any argument that South Dakota law should apply, the Court of Appeals held that the trial court had erred by applying Minnesota law, which is relatively liberal as to the admissibility of parol, and in failing to apply South Dakota law, which is unusually restrictive. S.D. Compiled Laws Ann. §53-8-5 (1967); *Baker v. Jewell*, 77 S.D. 573, 96 N.W.2d 299 (1959).

B. Statement of Facts.

1. Structure of the Transactions.

Each of the Dakota Feeders limited partnerships purchased feeder cattle that it fattened at feedlot facilities operated by Fall River Feedlots, Inc. ("Fall River"). Fall River is owned seventy five percent by Hubbard and twenty five percent by C. M. Largent, Fall River's president and manager. Largent was responsible to John McNeal, a vice president of Hubbard. McNeal was responsible for Hubbard's performance of its duties as general partner of each limited partnership.

From 1971, when the first Dakota Feeders limited partnerships were formed, until 1973 and 1974, when the events underlying this litigation began, each partnership operated in a similar manner. Each used virtually identical limited partnership form agreements to document its existence. Bank loans were used both to finance investments by the limited partners and to finance partnership acquisitions of feed and cattle. For each limited partnership that was to proceed, Largent (as Hubbard's agent) bought, fattened, and sold a herd of cattle; thereafter, the limited partnership was dissolved.

All of the capital for the limited partnerships came from the limited partners, in the form of cash and letters of credit. For its management services Hubbard received four dollars per animal from Dakota 14 and Dakota 16. Hubbard was also entitled to receive a percentage of any profit.

Fall River received payment from the limited partnership for feed and the use of its feed lot. Fall River needed to operate at about seventy percent of its capacity in order to break even (Pl. Ex. 29, part 16).

Mueller and Devane are in the management consultant business. In addition to the investments they made with Hubbard, they had experience with other cattle and real estate investments. At first, they dealt with Hubbard through an intermediary; however, by the summer of 1973, prior to the events underlying this litigation, they had come to deal directly with Hubbard (Tr. 218). The principal relationship was between Mueller, speaking for himself and Devane, and McNeal, speaking for Hubbard. Mueller dealt frequently with McNeal, both by telephone and in personal meetings, and developed a substantial degree of confidence in McNeal. Mueller testified:

I felt very comfortable with Mr. McNeal. I had a lot of confidence and respect. I thought when we discussed things that we discussed things openly and that they were for real. (Tr. 253)

Mueller and McNeal agreed to the formation of Dakota 14 in July of 1973. By September and October it was apparent that Dakota 14 would suffer substantial losses. The parties agreed orally to reduce the size of the Dakota 14 herd from the 3,000 specified in the limited partnership agreement (Pl. Ex. 8) to 2,752 (Tr. 97).

Mueller and Devane did not seek to recover all losses sustained in Dakota 14, but confined their claims to those losses occurring as a result of additional investments they made in December, 1973. As they made their Dakota 16 investments in October, 1973, we turn first to that partnership.

2. Dakota 16

It was in the context of severe losses impending for Dakota 14 and Dakota 12, an earlier partnership which ultimately produced losses exceeding \$200,000, that Mueller expressed his reluctance to form a new partnership. He explained to McNeal, "John, we just can't buy ourselves into another loss position. It just doesn't make sense" (Tr. 70). McNeal urged a prompt decision on forming Dakota 16, claiming there were others anxious to take space in the feedlot if Mueller and Devane chose not to proceed (Tr. 73). This claim by McNeal was false (Tr. 948). At the same time, McNeal sought to reassure Mueller that "things would get better after the first of the year" (Tr. 71). Largent predicted that Dakota 16 would be "a real barn burner" (Tr. 82).

Mueller repeated that he and Devane did "not want to buy ourselves into another loss position" (Tr. 71). Eventually, Mueller testified:

I told John that the only way that we could really go ahead on this partnership [Dakota 16] was that if we had breakevens that were satisfactory that we had a chance to come out on it. (Tr. 72)

Mueller and McNeal then discussed "breakevens" for any cattle that Dakota 16 might purchase. In the feeder cattle business, the term "breakeven" refers to an estimated price at which cattle must be sold in order to equal the total of the original purchase expense of the cattle and the cost of feed. When the Dakota Feeders partnerships began, in late 1971, breakevens were in the thirty cents per pound range. By the early fall of 1973, breakevens had risen to record highs, being then in excess of fifty cents per pound (Tr. 76). However, McNeal and Largent predicted that the purchase price for feeder cattle would soon decline, thereby causing breakevens to similarly decline (Tr. 71, 81).

McNeal told Mueller that for Dakota 16, breakevens of forty-three to forty-five cents would be "logical . . . to consider" (Tr. 72). Mueller agreed. McNeal then agreed, as Mueller testified:

[I]f we would go into this partnership that he would call us before any cattle were purchased if they were above 43 or 45 cents, if they were above the 45-cent range. (Tr. 73) (emphasis supplied)

With the predictions that breakevens would drop and McNeal's assurances, Mueller and Devane executed the form partnership documents on October 15, 1973, and

made their capital contributions.² The documents were form documents, incorporating none of the oral assurances the agreement McNeal had made. They were identical, except for dates and numbers, with the forms used in all previous Dakota Feeders limited partnerships. The forms were those which had previously been approved by the participating banks (Tr. 262). Mueller did not insist that the agreement McNeal made be reduced to writing, because "I just trusted what he said" (Tr. 259).³ McNeal, however, denied giving any oral promises or assurances to Mueller. The jurors resolved the factual dispute in favor of plaintiffs, a resolution the Court of Appeals did not accept (See discussion in Part VI, *infra*).

On November 27, 1973, Mueller and Devane first learned, despite McNeal's assurances about forty-three to forty-five cent breakevens, that Hubbard had already bought 417 cattle for Dakota 16, with breakevens of forty-seven cents. Some of them were purchased prior to any agreement of the parties. (Pl. Ex. 4, Tr. 83)

Mueller called McNeal to complain, expressing concern particularly over the breakevens (Tr. 85). Mueller

²The contributions were made to enable the partnership to purchase prepaid feed and, in the event breakevens did decline to forty-five cents or less, to purchase feeder cattle. The plan was to purchase the feed before the end of 1973, regardless of feeder cattle prices and breakevens, in order to be assured of the tax benefits of a prepaid feed contract if prices improved adequately in 1974. If prices did not improve, the prepaid feed was to be sold "when it was evident [we] were not going to complete the partnership" (Tr. 87). Largent and McNeal both admitted discussing the possibility of purchasing feed in 1973, then reselling it in 1974 if prices for feeder cattle did not improve (Tr. 555, 1003-05). During December, 1973, Largent did buy prepaid feed for the partnership intending to resell if the partnership did not proceed with the purchase of cattle (Tr. 87, 555).

³In the cattle business particularly, the evidence established, trust is important. It is a matter of pride not to insist on written agreements. Not only Mueller, but also one of the witnesses Hubbard called, so testified (Tr. 251-52, 779).

emphasized that the purchase created problems for him because his banker had loaned him the money for Dakota 16 predicated on the representation that the partnership would make purchases at forty-three to forty-five cent breakevens (Tr. 89). McNeal responded, as Mueller testified, that "they wouldn't do any more without talking to us" (Tr. 89). McNeal repeated similar assurances in December (Tr. 103).

In fact, neither Hubbard nor Fall River bought any more cattle for Dakota 16 in either November or December of 1973, facts duly reported to Mueller (Pl. Ex. 4).

In January, 1974, Largent purchased 1,516 cattle for Dakota 16. That number represented over sixty percent of all cattle Fall River purchased for all customers in January, 1974 (Pl. Ex. 35, Tr. 94). Contrary to McNeal's representation that Fall River had potential customers waiting in line, Fall River needed to have those cattle in its lot in order to have enough cattle on feed to avoid operating at a loss during several months of 1974 (Pl. Ex. 29, part 16; Tr. 947, 950). Contrary to McNeal's agreement, all 1,516 cattle were purchased at breakevens exceeding forty-five cents and most at breakevens exceeding fifty cents (Tr. 90-92; Pl. Ex. 4). Despite the fact McNeal and Mueller had at least four telephone conversations in January (Pl. Ex. 31; Tr. 143-44), McNeal did not once discuss these purchases with Mueller (Tr. 89-90).

Only when Mueller's son contacted Fall River for its monthly report on January 31, did plaintiff learn of the January purchases (Tr. 90). Mueller called McNeal in anger, demanding to know why he had permitted the January purchases. Mueller testified:

He said, well, they had to buy them in January. I said, "But I thought we were going to talk about this before we bought them." His answer to me was that they had to buy them in January to fill the partnership. (Tr. 91)

The result of these purchases, combined with declining fat cattle prices and rising feed prices, was a financial disaster. Mueller and Devane lost their entire investment, \$258,000. This sum is the total amount of the jury verdicts as remitted on Dakota 16.

3. Dakota 14

Meanwhile, the financial condition of Dakota 14 was deteriorating. On December 12, 1973, the financing bank instructed Largent to sell the herd immediately (Tr. 744-46). Largent sought alternatives to a forced sale, stating he believed the value of the cattle would increase in January. The bank sought a guarantee from Hubbard, which it declined to give (Tr. 289). Instead, McNeal urged the limited partners to prevent a forced sale by making further investments, representing that this was "[t]he one alternative that the bank has offered" to forced sale (Pl. Ex. 10). McNeal admitted he never told Mueller that the bank had also offered the alternative of a guarantee by Hubbard, which it refused (Tr. 289).

McNeal also failed to inform the limited partners that the bank was requiring a compensating balance for its loans to Dakota 14. In late November the bank required the partnership to borrow \$169,300, deposit it back with the bank, and pay interest on it without being able to use the funds (Pl. Ex. 28, part 8). The result, aside from

nearly crippling a partnership already in financial distress, was to increase the bank's effective interest rate to twelve percent. McNeal knew this raised a usury problem, but made no objection on behalf of the partnership and sought no legal opinion on the subject; he never mentioned the compensating balance requirement or the twelve percent interest factor to Mueller (Tr. 1041-45). Rather, McNeal had represented to Mueller that the bank was charging ten percent (Tr. 116).

A forced sale in December would have resulted in a loss of approximately \$102 per animal or \$294,000 (Pl. Ex. 10). When McNeal proposed additional investments to prevent a forced sale, Mueller held a series of conversations with McNeal. On December 24, Mueller told McNeal that he and Devane did not want to proceed without some form of safeguard from Hubbard (Tr. 102). On December 26, Mueller and his son went to Mankato to discuss the situation with McNeal in person (Tr. 102-03). Mueller expressed reluctance to provide an additional letter of credit without "a form of stop-loss agreement" (Tr. 103). McNeal said he felt the prices for cattle would improve after the first of the year. Mueller testified:

I said, well this is fine, but we sure don't want to lose this second letter of credit . . . So our concern was let's at least limit our exposure. Mr. McNeal, John said he thought they could do that and he would talk with their counsel and that they would see what they could do to get us a revised contract. (Tr. 104)⁴

⁴McNeal testified he did not recall the conversation on December 24 (although the fact of the telephone call is shown in Pl. Ex. 31) or the meeting on December 26 (although portions of the conversations concerning future prices are reflected in Pl. Ex. 19). While the jurors accepted Mueller's testimony, the Court of Appeals appears to have decided it is doubtful the conversations occurred.

Hubbard's counsel did provide a revised contract. That document did not contain a guarantee against losses over \$100 per head, but it did state that Hubbard "agrees to use its best efforts to attempt to hold losses to \$100 per head" through use of advance contracts (Pl. Ex. 11-A). When Mueller complained to McNeal about the absence of a guarantee, McNeal told Mueller:

[H]e would take care of the situation, assured me that they would really do their best to really do this . . . so that we wouldn't lose more than \$100. (Tr. 104-05)

Reassured, Mueller and Devane signed the revised agreement. They then contributed additional letters of credit for another \$110,000 (Pl. Ex. 12).⁵

Future prices for fat cattle did in fact rise during early January. Mueller called McNeal and urged him to advance contract the cattle and "minimize our losses" (Tr. 105; see also, Tr. 111). McNeal resisted at first, then said he would call Largent "and see what they could do about it" (Tr. 105).

The bank, secure with the second letters of credit, never required advance contracting for Dakota 14; Hubbard

⁵Mueller's uncontroverted testimony, was that he and Devane provided the second letters of credit "after" receiving the revised contract (Tr. 110). Hubbard did not dispute this sequence at trial, but in its briefs and argument before the Court of Appeals, repeatedly argued that the letters had been given earlier and thus could not have been given in reliance on the revised contract or oral representations and accused plaintiffs of giving "false" testimony and of using a "twisted or distorted fact technique" (Appellant's Reply Brief, pp. 11 and 22, see also Brief of Appellant, pp. 10 and 11). Common sense confirms the sequence of events described by Mueller; one would hardly expect Hubbard to add the "best efforts" language to its revised contract if plaintiffs had already made their second investments in Dakota 14. The Court of Appeals, as discussed *infra*, appears to have come to its decision in large measure because it disbelieved Mueller's testimony. It appears to have accepted Hubbard's position even on this afterthought (A-12).

never accomplished it. Prices declined steadily after January 10. Advance contracting at that date would have held losses to \$51 per head (Pl. Ex. 33A). Advance contracting in late January would have meant losses of \$92 per head (Pl. Ex. 33B). Holding the cattle to slaughter weight meant losses of \$157 per head (Pl. Ex. 33A).

As prices continued to decline in February, Mueller continued to urge McNeal to advance contract the cattle (Tr. 145). McNeal himself made no attempt to advance contract the cattle beyond a telephone call to Largent. Largent testified that some time in January or February he talked to two packers who were not interested in advance contracting (Tr. 838-39).

The failure of Hubbard, McNeal, and Largent to advance contract the cattle came at a time when McNeal was advising Hubbard's bank that it is always possible to advance contract cattle (Tr. 1039). When instructed by that bank to advance contract cattle for other partnerships in December of 1973 and June of 1974, Hubbard did so within a week of the demand (Tr. 928-32).

In any event, Mueller's pleas to advance contract Dakota 14 cattle were not met. Instead, Fall River retained the cattle past normal slaughter weights, for weeks after the projected selling dates. Fall River profited from this course, while the limited partners bore all losses. Mueller and Devane lost their entire initial investment in Dakota 14 and approximately one-half of their December investments (Tr. 112).

Plaintiffs argued to the jury that Hubbard's liability was established by its failure to use its "best efforts" to advance contract, as the written agreement required, and also by its misrepresentations and concealments.

The jury returned verdicts on Dakota 14 for a total of slightly over \$80,000, representing most, but not all, of the losses incurred after the December investments.

The Court of Appeals vacated all four judgments, holding they were all tainted by passion and prejudice of the jurors and by inadmissible parol evidence.

VI.

REASONS FOR GRANTING THE WRIT

We submit that the Court of Appeals erred in three significant respects, each placing it in conflict with other Courts of Appeals and each involving significant departure from the accepted and usual course of judicial proceedings.

1. The Court of Appeals erred in substituting its judgment as to the integrity of the jurors for that of the trial judge.

2. The Court erred in vacating judgments for a choice of law issue never raised, argued, or briefed before either the district court or the Court of Appeals.

3. The Court erred in substituting its judgment as to the credibility of witnesses for that of the jurors.

This petition presents basic issues as to the power and responsibilities of a Court of Appeals vis-a-vis trial judge and jury.

A. In Substituting its Judgment as to the Integrity of the Jurors for that of a Trial Judge, the Court of Appeals in Effect Deprived Petitioners of their Right to Trial by Jury in Contravention of the Seventh Amendment, Contrary to the Law in Other Circuits, Contrary to the Accepted and Usual Course of Judicial Proceedings, and Contrary to Rule 52(a) of the Federal Rules of Civil Procedure.

The Court of Appeals held that the trial court had erred in denying defendant's motion for a new trial, stating "passion and prejudice" "led to the grossly excessive verdict on Dakota 16." (A-30). The Court reached this conclusion with no written analysis of the law on this subject, an incomplete analysis of the facts and despite the trial court's express finding that the verdicts were not the result of passion and prejudice. *This appears to be the first instance in the history of the federal court system where a Court of Appeals has reversed such a determination by a district court judge.* In so doing the Court of Appeals acted contrary to the Seventh Amendment, the law in other circuits, the accepted and usual course of judicial proceedings, and Rule 52(a) of the *Federal Rules of Civil Procedure*.

The trial court, Judge Larson, made an express finding that "the [jury's] mistake appears to be an honest one," and that the excessive verdicts were not the result of "bias, prejudice, or a reckless disregard of the evidence and instructions" (A-3). The Court of Appeals held, "We do not agree," citing three facts: the "large excess in itself," what the Court perceived to be the "absence of any plausible explanation," and the "plus damages" (A-29). Those

facts are, under the authorities cited below, insufficient for reversal.

The "absence of any plausible explanation" reference is simply another way of saying the Court of Appeals may substitute its views of the integrity of the jury for those of the trial court. It is wholly subjective and speculative; it involves a plain non sequitur. That we do not know why the jury arrived at certain figures means only that: we do not know. One might just as well say the reason for the jury's decision "must have been" ignorance, confusion, or color blindness as say the reason "must have been" passion and prejudice.

We are not permitted to interview the jurors, so we do not know the reasons for either the relatively small size of the Dakota 14 verdicts or the relatively large size of the Dakota 16 verdicts.⁶ Defendant never sought an evidentiary hearing as to the existence of passion or prejudice.⁷ What the Court of Appeals has done amounts to requiring the prevailing party to demonstrate the integrity of the jury without permitting it to conduct any evidentiary hearing.

⁶Without waiving our position that speculation is not called for, we do believe there are plausible explanations for the amounts of the verdicts. One is simple confusion, inasmuch as the case "was an exceedingly difficult one to comprehend, given the sophisticated financial dealings involved." (A-3). Another is the possibility the jurors added the amount of the prepaid feed contract for Dakota 16 (Pl. Ex. 28, part 12) to the amount of the lost investments, a possibility that fits the Dakota 16 verdicts within *Five Dollars*.

The Court also relied on the "plus damages" aspects of the verdicts, although the uncontroverted facts suggest strongly that the jurors added those figures to cover plaintiffs' counsel fees (A-3). This was an error, but easily corrected by remittitur.

⁷Had defendant seriously believed it could establish that passion and prejudice swayed the jury, it could have requested an evidentiary hearing as contemplated in *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 104 N.W.2d 301 (1960).

Judge Larson cited two central facts in support of his finding that the excessive verdicts were the result of an "honest mistake," not the result of passion and prejudice: "the low verdicts awarded for Dakota No. 14" and the fact that the "case was tried fairly" (A-3). Those two facts are undisputed. We do not perceive how a jury swept away by passion would award less than plaintiffs invested in Dakota 14. We also do not understand how an appellate court deems it permissible to overturn a verdict for passion when there was not a single objection during argument and no claim made at trial that counsel for plaintiffs attempted to arouse passion in the jury.

We believe it is demeaning to these jurors even to argue about whether they were affected by "passion" and "prejudice," so far were they from that state. However, the finding has been made and we are obliged to respond. If the members of this Court or the Court of Appeals had been able to observe the members of the jury throughout the trial, a finding of "passion" and "prejudice" would appear utterly unfair. Each of them were individuals of modest means and limited business experience, conscientiously attempting to absorb the complicated facts and arguments. The trial judge observed the jury during the six and one-half days of trial, during a request it made for additional information concerning Dakota 14, and during the reading of the verdicts. Judge Larson also observed the demeanor of counsel throughout trial. He had ample support for his characterization of the atmosphere of the trial as one "tried fairly" and of the jurors' mistake as "an honest one which can be corrected by remittitur" (A-3).

In rejecting Judge Larson's explicit finding that remittur was an adequate corrective measure the Court of Appeals substituted its judgment for his as to the integrity of the jurors. In so doing it placed itself squarely in conflict with other circuits.

In the past, the Court of Appeals for the Eighth Circuit had held that the decision of a trial judge to permit remittitur, rather than require a new trial, must stand unless the result is "monstrous" or "shocking." *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 448 (8th Cir.), cert. denied, 368 U.S. 929 (1961).

The Seventh Circuit Court of Appeals adopted a similar approach in *Dorin v. Equitable Life Assurance Society of the United States*, 382 F.2d 73 (7th Cir. 1967), where it affirmed denial of a new trial when plaintiff agreed to a remittitur from \$57,500 to \$17,500 for compensatory damages and from \$125,000 to \$7,500 for punitive damages. The Court stated:

[W]hatever the cause of the jury's making an excessive award of damages, the judge could properly conclude that such cause did not infect the jury's finding on the existence of malice to the prejudice of Equitable. There was nothing in the record, other than the size of the award, to impeach the objectivity of the jury or the fairness of the proceedings. . . . 382 F.2d at 78.

In addition to the Seventh Circuit, the Fifth Circuit has adopted a similar rule. See, e.g., *Gulf Coast Bldg. & Construction Trades Council v. F.R. Hoar & Son, Inc.*, 370 F.2d 746 (5th Cir. 1967). See also Annot., *Verdict in Excess of Amount Demanded as Requiring New Trial Notwithstanding Voluntary Remittitur*, 65 A.L.R. 2d 1331, 1334 (1959):

In the vast majority of the cases which have considered the question it has been held, often without extended discussion, that the mere fact that a verdict has been returned in excess of the amount of damages demanded by a party in his pleadings . . . will not necessitate a new trial when the successful party is willing to remit the amount by which the verdict exceeds his demand.

We urge that it takes considerably more for an appellate court to overturn the trial judge's finding that the jury acted with integrity than, "We do not agree with such determination" (A-29). That is a wholly subjective standard for "review;" in fact it is no standard at all. The standard for reversal must be at least that the determination was "clearly erroneous." 6A *Moore's Federal Practice* ¶59.05[3], at 59 (2d ed. 1974). In fact, we believe the law permits reversal only when the result would otherwise be "monstrous" or "shocking." *Solomon Dehydrating Co. v. Guyton*, 294 F.2d at 448. Rarely may a Court of Appeals reverse a finding of fact by the trial judge on such a subjective matter as the integrity of the jury:

[I]t should *never* do so where it does not clearly appear that the findings are not supported by *any* evidence. *United States v. Johnson*, 327 U.S. 106, 112 (1946) (emphasis supplied) (reversing the Court of Appeals for reversing the trial court's denial of new trial motion, based on the trial court's finding of an absence of false testimony).

By its seeming departure from *Solomon* the Court of Appeals creates a conflict among the circuits.

Beyond that conflict, the Seventh Amendment and Rule

52(a), neither of which were mentioned in the opinion of the Court of Appeals, proscribe the result reached by that court in this case.

In reviewing both the size of the verdicts and Judge Larson's decision not to grant a new trial, the Court of Appeals abridged the Seventh Amendment's provision limiting examination of facts found by juries.

As Charles Alan Wright points out, somewhat sarcastically, "The Seventh Amendment might have been thought to give difficulty," when a Court of Appeals undertakes review of the character undertaken here.⁸ After all, the common law never permitted review of an order denying a motion for a new jury trial.

An exhaustive examination of the early English cases has led one writer to conclude there is not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court, or certified, that the verdict was against the evidence, and that he was dissatisfied with the verdict.⁹

Modern courts remain sensitive to the special role of the jury and to the constitutional protection afforded that role. The deference which jury verdicts must be accorded to satisfy constitutional dictates is cogently summarized in *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 447 F. Supp. 543, 547 (D. Colo. 1977) as follows:

⁸Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 753 (1957).

⁹Wright, *supra* note 8 at 762, citing Weisbrod, *Limitations on Trial by Jury in Illinois*, 19 Chi.-Kent L.Rev. 91, 92 (1940).

The constitutional right of trial by jury is nothing less than the right to have human conflict resolved by the considered judgment of representative members of the community. Any interference with such a community judgment must be justified by compelling circumstances showing unfairness in the manner in which the issue was presented or considered. In evaluating a motion to set aside a jury verdict, it must be remembered that the Seventh Amendment of the United States Constitution specifically preserved the right of trial by jury as it existed in the common law courts of England.

There are two related, but distinguishable Seventh Amendment questions present in this case. One is whether the Court of Appeals had power to review the size of the verdicts, especially in the absence of a finding that they were "monstrous" or "shocking." *Solomon Dehydrating Co. v. Guyton*, 294 F.2d at 448. The other is whether the Court of Appeals had power to review the order denying a new trial, when the trial court found there was no passion or prejudice.

The Wright article previously quoted deals with both issues. As to the first, Professor Wright points out that the Supreme Court has in the past held that appellate courts have no such authority,¹⁰ but that all courts of appeals except the Eighth Circuit have held otherwise. In doing so, those courts "have generally ignored the Seventh Amendment issue,"¹¹ as well as prior decisions of this

¹⁰*Metropolitan R.R. v. Moore*, 121 U.S. 558, 574-75 (1887) ("motions for a new trial based on the ground that the damages allowed by the verdict are excessive" present "purely a question of fact," and are not reviewable).

¹¹Wright, *supra* note 8 at 753, quoting a concession by Professor Moore, who favors review of the size of verdicts. 6 *Moore's Federal Practice* ¶3827 (2d ed. 1953).

Court. Now the Court of Appeals for the Eighth Circuit has joined its brethren. We believe it was improper, or at least inappropriate, for the Court of Appeals here to review the size of the verdicts, when neither the Court nor even Hubbard claimed that the results were "monstrous" or "shocking." *Solomon Dehydrating Co. v. Guyton*, 294 F.2d at 448. See also *Neese v. Southern Railway*, 350 U.S. 77 (1955); *Snyder v. United States*, 350 U.S. 906 (1955); *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968).

Of greater significance, however, is the other Seventh Amendment issue, whether a Court of Appeals may or should review an order denying a new trial, when the trial court has found an absence of passion or prejudice. So far as we are aware, this case represents the first occasion upon which a Court of Appeals has done so. In 1957, Wright was able to observe:

[S]o far as I can find, there is not a single case in which a federal appellate court has ever reversed and ordered a new trial on the ground that the trial court did abuse its discretion in denying a motion of this type [for new trial on the ground "verdicts are against the weight of the evidence"].¹²

The Supreme Court has expressed the view repeatedly that an appellate court may not review denial of a motion for a new trial for *any* error of fact, including the size of a verdict. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933); *United States v. Faub*, 37 U.S. (12 Pet.) 1 (1838); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In *Socony-Vacuum*, this Court stated categorically:

¹²Wright, *supra* note 8, at 760.

Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review. 310 U.S. at 248.

See also *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953).

In *Fairmount Glass*, this Court dealt with a claim that the excessiveness of a verdict required a new trial. Speaking for the Court, Mr. Justice Brandeis stated:

The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals . . . Sometimes the rule has been rested on that part of the Seventh Amendment which provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." More frequently the reason given for the denial of review is that granting or refusing of a motion for new trial is a matter within the discretion of the trial court. 287 U.S. at 481-82 (footnotes omitted).

Here, the Court of Appeals neither considered the Seventh Amendment issue nor acknowledged that the decision on the motion for new trial was within the trial court's discretion. There is significant doubt whether a Court of Appeals has the power to overrule a trial judge on a motion for new trial, where the only ground given is a "factual" determination by the Court of Appeals that the jury

acted improperly. *United States v. Johnson*, 327 U.S. at 112, *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. at 481-82. It seems elementary that the Court may not do so without even finding an abuse of discretion.

One of the most disturbing aspects of this case is the superficial manner in which the Court makes the serious charge that the jury acted improperly, particularly in the absence of *any* claimed misconduct of counsel, plaintiffs, or the trial court. Equally as serious is the cursory manner in which the appellate court disregarded the trial judge's contrary finding. Both acts run afoul of this Court's pronouncement in *Fairmount Glass*:

Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct. 287 U.S. at 485 (emphasis supplied)

The latter act also runs afoul of Rule 52(a) of the *Federal Rules of Civil Procedure*, which provides in relevant part:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Judge Larson made a finding of fact, one directly relating to the credibility or integrity of the jurors, whom only he of all the judges reviewing this case observed. The Court of Appeals did not apply even the "clearly erroneous" test, but only a newly formulated "We do not agree" test (A-29) or, in other words, no test at all.

Vacating judgments on that subjective basis, ignoring

the express requirement of Rule 52(a), would in itself constitute such a departure from accepted and usual judicial practice as to require an exercise of this Court's power of supervision.

The error, however, is magnified in this case by two additional factors that make the Court's rather blatant exercise of appellate power even more unacceptable and more unusual than if it involved only a failure to invoke the "clearly erroneous" test. The decision of the Court of Appeals ignores the second independent requirement of Rule 52(a), and as discussed above, ignores the Seventh Amendment.

Rule 52(a) also requires "due regard" be given to the trial court's opportunity to "judge credibility." Here, the Court gave no regard to Judge Larson's opportunity to observe the jurors, counsel, and the parties. On such a subtle, delicate, subjective question as whether the jurors have been swept away by "passion" or "prejudice," the finding of a trial judge is obviously entitled to more respect than, "We do not agree." In fact, under much more difficult circumstances, this Court has said that a Court of Appeals may "never" reverse a trial judge's finding as to credibility of a witness, a question analogous to integrity of jurors, "where it does not clearly appear that the findings are not supported by any evidence." *United States v. Johnson*, 327 U.S. 106, 112 (1946). There, the Court reinstated a criminal conviction, which the Court of Appeals had vacated on the grounds one of the government witnesses had lied at trial. The Court observed:

The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de

novo motions for a new trial. It was wrong in the second instance when it did review the facts de novo and order the judgment set aside. 327 U.S. at 113.

Sweeping away a finding of honesty on the part of the jurors, as the Court of Appeals has done here, lends substance to the following view of Dean Leon Green:

[T]he appellate courts have now secured control of all the essentials of jury trial. The trial judge is not much more than a trial examiner, while the jury simply satisfies the public and professional craving for ceremonial. . . .¹³

The Court's complete disregard of the dual requirements of Rule 52(a), if permitted to stand, will have the inevitable effect of diminishing respect for trial judge and jury. It also invites more appeals, suggesting that a party with a witness whom the jurors or trial judge do not believe may have a lawyer whom, in the absence of all witnesses, the Court of Appeals will believe.

As Charles Alan Wright has expressed:

The principal consequences of broadening appellate review are two. Such a course impairs the confidence of litigants and the public in the decisions of the trial courts, and it multiplies the number of appeals . . . When they are successful, and lead to a new trial, they add to the burden on already-crowded trial courts.¹⁴

This case reflects a disturbing trend, one that has troubled liberal and conservative commentators alike. It is only natural that members of courts of appeals should believe they are better able to judge the merits of a case than

¹³Green, *Jury Trial and Mr. Justice Black*, 65 Yale L.J. 482, 486 (1956).

¹⁴Wright, *supra* note 8 at 779-80.

mere jurors. It is only natural that they should desire to "do justice."¹⁵ The problem, as stated by Dean Green, is obvious:

Trial by record before an appellate court . . . has little resemblance to jury trial as it had developed in Anglo-American judicial history. . . . Nor does trial by record serve the cause of justice to a greater advantage than jury trial; trial by record has its dangers, also. It is rare that the "fall out" in jury trial does not pollute a record with error. Moreover, the trial may be recorded with the utmost fidelity, but many of its overtones and undertones do not find their way into the record. In the trial court the case is pulsing with life; by the time it reaches the appellate court, much of its life has leaked out or evaporated.¹⁶

Not only is life gone from the record, but there is danger in "[p]assing on the merits of a close case at long range in time and distance and in a hushed environment."¹⁷ Here, we submit, bold attacks on Mueller's credibility, delivered by respected defense counsel, persuaded the Court of Appeals that the trial result was wrong. "If the appellate court is so convinced, its judicial conscience drives it to exercise some control to nullify what looks from afar like a bad result."¹⁸

Aside from the fact that the Court of Appeals may well be wrong in its assessment of what is fair and just in a given case, as we believe it was here; further dangers arise from the Court of Appeals' usurpation of the role of

¹⁵*Id.* at 779.

¹⁶Green, *supra* note 13 at 486.

¹⁷*Id.* at 487.

¹⁸*Id.*

trial judge and jury. Those dangers were expressed best by the Eighth Circuit Court of Appeals' own opinion in *Pendergrass v. New York Life Ins. Co.*, 181 F.2d 136 (8th Cir. 1950). That opinion, rendered at a time that the Eighth Circuit was a stronghold of belief in the exercise of appellate self-restraint, dealt with review of a nonjury trial. Its remarks apply with even greater force to review of a jury trial.

The *entire responsibility* for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, *detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases.* 181 F.2d at 138 (emphasis supplied).¹⁹

All who practice in or serve our judicial system are only too well aware of the

vexing problems of delay, congestion, and excessive expense that we experience in the resolution of disputes.²⁰

One of the central aspects of those problems has been the disproportionate increase in the number of appeals, increases measured in the hundreds of percentage points in the last decade and a half.²¹

This case, we submit, provides an opportunity to respond significantly to the problem of congestion that the Chief Justice has repeatedly described.

¹⁹See also *id.* at 485.

²⁰Chief Justice Burger's 1977 Report to the American Bar Association, 63 A.B.A. 504 (1977).

²¹*Id.* at 508.

B. The Decision of the Court of Appeals to Vacate Judgments for a Choice of Law Issue Never Raised, Argued, or Briefed before either the District Court or Court of Appeals Conflicts with Decisions of Other Courts of Appeals and Represents a Substantial Departure from the Accepted and Usual Course of Judicial Proceedings.

The ground for vacating plaintiffs' judgments to which the opinion of the Court of Appeals devoted the majority of its analysis is that South Dakota law required exclusion of parol evidence in the presentation of plaintiffs' contract claims. That opinion of April 10, 1978, is the *first occasion* on which the South Dakota law as to parol evidence entered the trial or appeal of this case.

Without brief or argument on either issue, the Court held: 1) South Dakota law governs the admissibility of parol evidence in this action; 2) South Dakota law excludes plaintiffs' parol contract evidence. We believe there is real doubt as to whether the Court of Appeals correctly decided either issue.²² However, we do not ask this Court

²²As the Court noted (A-19), Minnesota law governs the choice of laws issue. The Supreme Court of Minnesota has evidenced recently an increasing tendency to apply Minnesota law when the case involves substantial contacts with Minnesota. See, e.g., *Hague v. Allstate Ins. Co.*, Finance & Commerce (Minn. S.Ct., No. 44, April 7, 1978) and *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973). This change was noted in *Meyer v. Chicago, Rock Island and Pacific R.R.*, 508 F.2d 1395, 1396 (8th Cir. 1975). Here, all parties either reside or work in Minnesota; all dealings between Mueller and McNeal occurred in Minnesota; all written agreements were executed in Minnesota. It is true, of course, that the partnership agreements for Dakota 16 and Dakota 14 (but not the revised contract for Dakota 14) provide that they are to be interpreted under South Dakota law.

South Dakota law is concededly most restrictive as to admissibility of parol evidence. However, there are opinions interpreting the South Dakota statute and a virtually identical statute in North Dakota that suggest parol is permissible to show an oral agreement to induce a written agreement. See, e.g., *De Rue v. McIntosh*, 26 S.D. 42, 47, 127 N.W. 532, 534 (1910); *In re Roberts*, 358 F. Supp. 392 (D.S.D. 1973); *Smith v. Michael Kurtz Construction Co.*, 232 N.W.2d 35 (N.D. 1975).

to review the merits of the decision of the Court of Appeals on either issue; we doubt that either is of national importance. What we do urge this Court to review is whether the Court of Appeals may or should decide a case on the basis of a choice of laws issue never presented to the district court. Such action, we submit, is fundamentally unfair; it is also in conflict with the decisions of at least four other Courts of Appeals.

We emphasize there is no doubt that South Dakota law was never urged upon the trial court and that defendant assented to the applicability of Minnesota law. Prior to trial, Hubbard's experienced trial counsel anticipated and researched the parole evidence issue. Hubbard submitted a brief on the issue early during testimony of the first witness at trial (Tr. 57), presenting the issue as a question of Minnesota law. Oral argument ensued, again Hubbard interpreting what "the Minnesota Supreme Court . . . says. . . ." (Tr. 58). Hubbard's motion for new trial submitted the same issue to the district court, again as a matter of Minnesota law. At the appellate level, Hubbard continued to present the parole evidence issue as a matter of Minnesota law (Brief of Appellant, pp. 33-35). All cases it cited are Minnesota cases.²³ The South Dakota law as

²³Judge Larson, a man with decades of experience as a trial lawyer and judge in Minnesota, made the correct decision as to admissibility of the parole evidence under Minnesota law. Minnesota permits introduction of parole evidence not only to prove oral agreements that were inducements to enter written agreements (as we believe South Dakota law does), but also to prove collateral oral agreements not intended to be covered by writing and to establish oral agreements made or reaffirmed subsequent to a written agreement (neither of which South Dakota law appears to permit). *Bussard v. College of St. Thomas, Inc.*, 294 Minn. 215, 224-25, 200 N.W.2d 155, 161-62 (1972) (noting that parole is "especially likely" to be admissible when one is dealing with "standardized forms"); *Weyerheuser Co. v. Hvidsten*, 268 Minn. 448, 129 N.W.2d 772 (1964); *Lentz v. Pearson*, 246 Minn. 145, 74 N.W.2d 662 (1956); *Bjornstad v. Northern States Power Co.*, 195 Minn. 439, 444, 263 N.W. 289, 291 (1935); *Minneapolis Brewing Co. v. Yahnke*, 148 Minn. 178, 181 N.W. 331 (1921) (concerning oral "consideration for . . . signing" a written agreement).

to parole evidence was not mentioned once, at trial, in briefs, or on oral argument.

Deciding the case on a choice of laws issue never presented to the district court represents a radical departure from prior practice in the Eighth Circuit and places that Court in conflict with decisions of the Courts of Appeals in the Fifth, Ninth, Tenth and District of Columbia Circuits.

The Court of Appeals for the Eighth Circuit had previously taken the position that a court of appeals is wholly without power to inject a new choice of laws question into an appeal. *Pellerin Laundry Machinery Sales Co. v. Reed*, 300 F.2d 305, 309-10 (8th Cir. 1962). The Court declared that a choice of laws issue "may not be injected into the case for the first time on appeal." 300 F.2d at 309. It went on to state:

In the present case there is nothing in the record to show that the possible application of the Louisiana law was called to the trial court's attention and rejected by that court. *Absent this there can be no error.* 310 F.2d at 310 (emphasis supplied)

In *Pellerin*, appellant at least raised the conflict on appeal and the parties had an opportunity to brief and argue it. Here, the parties having had no opportunity to brief or argue the issue, it is particularly unfair, both to plaintiffs and to the trial judge, and inappropriate for the Court of Appeals to inject the issue for the first time in a reversing opinion.

The Court of Appeals for the District of Columbia has taken a somewhat different approach, holding that an appellate court has the power to consider a choice of laws

issue raised for the first time on appeal, but indicating that the exercise of that power is rarely appropriate. *Jannenga v. Nationwide Life Insurance Co.*, 288 F.2d 169 (D.C. Cir. 1961). In *Jannenga*, the Court affirmed a directed verdict for defendant; the directed verdict was the result of applying the law of the forum, rather than the place of contract, concerning which types of misrepresentations preclude recovery under a life insurance policy. The Court's opinion contains this analysis:

In an exhaustive treatment of the subject Professor Brainerd Currie has noted the inadequacy of allowing briefs on appeal to substitute for bringing the matter to the attention of the trial court. He points out that retrial may be needed to test issues and defenses not theretofore considered, and urges that judicial notice statutes not be interpreted as discharging the duty of counsel to bring the law of other jurisdictions to the attention of the trial court. See Currie, *On the Displacement of the Law of the Forum*, 58 Colum.L. Rev. 964, 984-95 (1958).

Thus, *orderly administration of justice suggests that plaintiff should not at this late stage be allowed to rely on the law of another jurisdiction*. While this court recognizes its power to take judicial notice of applicable state law, or to remand for its application, nothing in this record suggests that it is appropriate to do so in order to avoid injustice or to promote the ends of justice. We conclude, therefore, that the trial court was not bound to notice and apply the law of Ohio or Maryland statutory law *when appellant not only failed to rely on either but affirmatively argued the law of the District*. 288 F. 2d at 172 (emphasis supplied).

Here, of course, Hubbard did not even raise the issue on appeal. For the Court of Appeals to interject the issue of South Dakota law on its own, as occurred here, and require a new trial because of it, is to depart substantially from the accepted and usual course of judicial proceedings.

Regardless of whether the *Pellerin* or *Jannenga* view be more sound, it is clear that the Court of Appeals in this case adhered to neither. Under the *Pellerin* view, the Court had not the power to consider the issue. Under the *Jannenga* view, it had the power to apply South Dakota law at this late stage of the proceedings *only* if it determined, upon a reasoned analysis, that the interests of justice required it to do so. The "ends of justice" must mean more than that the Court of Appeals disagrees with the trial judge and jury. It can hardly mean that a new trial is necessary because the trial judge decided a parol evidence question on the law of the forum as experienced defense counsel had, indeed, urged him to do.

The Court of Appeals here did not address the "ends of justice" issue in any manner and gave no rationale for applying a law never previously urged or considered in the case. Such a decision can only lead to disillusionment and lack of confidence in our appellate court system and to an increase in the dramatic backlog of cases that already afflicts our district and appellate courts. If permitted to stand, it will foster appeals in cases that involve little beyond credibility issues.²⁴ It will obviously result in another jury trial here and make such retrials more likely in the future.

²⁴Hubbard cast its parol evidence argument as appropriate because of "false" testimony by Mueller and as necessary to prevent "fraud" (Appellant's Reply Brief, p. 22).

The Court's conduct places it in conflict with its own prior decision in *Pellerin*. It is also in conflict with the District of Columbia Circuit decision in *Jannenga* for the Court made no determination as to the extent of its power to rule on the choice of law issue at such a late stage in the case or on the propriety of exercising such power. This decision also conflicts with the Fifth, Ninth and Tenth circuits. *Autrey v. Williams and Dunlap*, 343 F.2d 730 (5th Cir. 1965); *Babb v. Schmidt*, 496 F.2d 957 (9th Cir. 1974); *Prudential Ins. Co. of America v. Carlson*, 126 F.2d 607 (10th Cir. 1942).

While *Pellerin* and *Jannenga* represent a pre-existing conflict among the circuits as to the abstract issue of their power, we emphasize that the decision in this case is in conflict with the decisions in each of those cases. Not only has the Court exercised power it arguably does not have (*Pellerin*), but it has done so without applying any standards²⁵ and without setting forth the justification required for doing so after trial (*Jannenga*).

²⁵Even those who tend to favor the exercise of greater review power by appellate courts recognize:

There is a danger that courts of appeals' decisions may themselves become more responsive to the personal values of individual circuit judges, and less responsive to general and idealized values of the system as a thing apart from the individuals momentarily operating it. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 555 (1969).

As an appellate court exercises more power, the need to articulate the bases therefor increases significantly. Here, we believe, an analysis of whether it was appropriate to apply South Dakota law would necessarily have led to rejecting it.

We note that Carrington appears to favor the trend towards the discovery and exercise of greater power by the courts of appeals as "responsive to our rising expectations for law as an instrument of social reform" and as necessary "to protect citizens from personalized applications of official power." *Id.* at 568. The decision by the Court of Appeals here involves neither social reform issues nor applications of official power. The need for review of possibly arbitrary conduct

Such action by the Court of Appeals raises fundamental issues of fairness and of the proper relationship of appellate court to trial judge and jury. Those issues affect the "dignity and significance of the trial court[s]" to exercise their function of "bringing repose" to disputes.²⁶ Concomitantly, those issues involve questions of maintaining respect for the appellate courts and of exercising control over already burgeoning trial and appellate court dockets. Therefore, we submit, the decision of the Court of Appeals herein warrants review to resolve conflicts among the circuits and warrants exercise of this Court's power of supervision.

C. The Action of the Court of Appeals in Disputing the Jurors' Resolution of Credibility Issues Conflicts with Decisions in Other Circuits and Constitutes a Substantial Departure from Accepted Judicial Practice.

While the opinion of the Court of Appeals devotes most of its discussion to the parol evidence rule, it creates a strong impression that the real reason for its decision is that the Court disagrees with the unanimous decision of the jurors. The Court made a point of expressing its doubt as to the merits of plaintiffs' claims:

A careful review of the record convinces us that all of plaintiffs' theories were of marginal validity at best. . . . (A-28).

of a single trial judge is not present when the case involves private litigants of approximately equal sophistication. Even Carrington tends to oppose appellate review of the size of jury verdicts, as occurred here. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeal*, 3 Ga.L.Rev. 507, 525-26 (1969).

²⁶Carrington, *supra* note 25, 82 Harv.L.Rev. at 567.

As plaintiffs' claims stand or fall on an assessment of the credibility of Mueller and McNeal, the Court's doubt as to the validity of plaintiffs' claims necessarily involves doubts as to Mueller's credibility. The Court reveals that this was the case in its recital of facts, using over and over such phrases as "McNeal *allegedly* stated," "statements *allegedly* made by McNeal," "McNeal *allegedly* made a number of statements," "certain *alleged* communications," and other language expressing doubt (A-10, 21, 9, 13, and 28). On one page of the Slip Opinion alone, the Court uses the word "allegedly" seven times to describe oral agreements or representations the jury determined McNeal had made (A-9-10).

We respectfully suggest that a "review of the record" is not a substitute for the opportunity the jurors had to observe the demeanor of the witnesses. Plaintiffs' case turned largely, if not entirely, on the credibility of Mueller as against that of McNeal and, to a lesser extent, Largent. In the past, the Eighth Circuit Court of Appeals would have stopped once it made that determination.

[W]here, as here, there is a clear conflict between the only two principal witnesses to a transaction the question presented is largely one of credibility and must be resolved by the trier of fact. *Pellerin Laundry Machine Sales Co. v. Reed*, 300 F.2d 305, 311 (8th Cir. 1962).

The law, of course, has traditionally been similar in other circuits, particularly in the context of a jury trial. *See, e.g., Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 511 F.2d 839 (4th Cir. 1975), *cert. denied*, 425 U.S. 975 (1976); *University Computing Co. v. Lykes*

Youngstown Corp., 504 F.2d 518, 531 (5th Cir. 1974); *La Presti v. Goodall Oil Co.*, 290 F.2d 653, 655 (7th Cir. 1961). *Accord, LaVender v. Kurn*, 327 U.S. 645 (1946).

The failure to grant the traditional deference accorded jury determinations of credibility, although not explicitly recognized in the opinion of the Court of Appeals, is woven in the very fabric of that opinion. The Court's preoccupation with Mueller's credibility is demonstrated by expression of doubt as to the "validity" of plaintiffs' claims—which are obviously "valid" if one believes Mueller, as the jurors did—and by its repeated use of terms denoting doubt. In applying a most restrictive interpretation of South Dakota's most restrictive parol evidence rule, the Court of Appeals reflects its distrust of jurors and its belief that members of an appellate court are better able to decide questions of credibility than members of a jury.

In this context, we emphasize that there was nothing inconsistent between Mueller's testimony as to the terms of his oral agreements with McNeal and the written instruments that were also in evidence.²⁷

As to Dakota 16, McNeal's principal oral promise was not to purchase at breakevens over forty-five cents a pound

²⁷We discuss this subject in anticipation that Hubbard may claim in its response to this Petition that the Court of Appeals may have vacated the judgments on parol evidence grounds even had it applied Minnesota law on the subject. We doubt that such an assertion would be accurate, in light of the Minnesota cases cited in note 23.

Moreover, the very fact that the Court of Appeals reached the choice of law question necessarily implied that the Court believed that Minnesota law would permit the introduction of the parol evidence in question. It is a fundamental tenet of choice of law that no choice need be made unless the local law of the two states in question differs. Where the local law is the same, the contract is to be treated as if it had contact with only one state. *Restatement (Second) of Conflict of Laws* § 186, comment c (1971). Had the Court of Appeals believed that both Minnesota and South Dakota law required the exclusion of the parol evidence, it surely would not have devoted 19 pages of its opinion to what it perceived as a "false conflict".

without prior discussions with Mueller (Tr. 73). The Court of Appeals found this promise to be inconsistent with three provisions of the written agreement. First, the Court stated it is inconsistent with the provision that the partnership "shall purchase" 2,000 cattle. However, the written agreement does not specify the conditions under which purchases shall be made, as the oral agreement does. It cannot be said the agreement *required* defendant to purchase 2,000 cattle. A similar provision in the Dakota 14 agreement did not prevent a decision to reduce the number of cattle purchased (Tr. 97; Pl. Ex. 8). Defendant bought no cattle for Dakota 16 in November or December because of adverse market conditions and acknowledged that if market conditions had not improved in January, it would not have bought for Dakota 16 at all (Tr. 816-18). Second, the court points to language that no limited partner shall participate in the "control, operation or management" of partnership business. That language hardly prohibits the *discussions* that McNeal promised before making purchases at breakevens over forty-five cents. McNeal certainly considered discussions to be appropriate on other partnership business. The record reflects over a hundred telephone communications between the parties (Pl. Ex. 31; Tr. 47). Third, the Court refers to language of consent to purchases made "on such terms and conditions as may be determined by the General Partner." Again, that language does not prohibit the General Partner from, and is not inconsistent with, agreeing to have discussions prior to making any purchases at breakevens above forty-five cents.

As to Dakota 14, the Court of Appeals asserts that plaintiffs claimed the existence of a "guarantee" and then

asserts the written agreement is inconsistent with a "guarantee." Plaintiff did not claim McNeal promised to "guarantee" against losses, but rather that defendant "would really watch out for us" (Tr. 104). The phrase, "some guarantee," appears once in Mueller's testimony (Tr. 104), not as a statement of a promise, but as a description of Mueller's request. Plaintiffs' argument, as to Dakota 14, did not approach a claim of a "guarantee," but instead focused on the absence of "best efforts," with brief mention of the promise to protect plaintiffs (Tr. 1135-43). An oral promise to protect or "watch out" for plaintiffs is not inconsistent with a written "best efforts" promise.

As discussed above, this case is representative of the fact "appellate power is rapidly on the increase"²⁸ and represents an extreme example of the trend. Members of appellate courts naturally "desire to 'do justice' ",²⁹ but may they assume that trial judges do not?

Surely the trial judge, aware of all the nuances of the trial, was in a better position to judge whether the oral agreements were intended to be integrated into the written agreements and whether the two were consistent. Such determinations must be made "in light of the situation of the parties, the subject matter and purposes of the transaction, and like attendant circumstances," including the language of both the written and oral agreements. *Busard v. College of Saint Thomas, Inc.*, 294 Minn. 215, 224, 200 N.W.2d 155, 161 (1972).

In the Dakota 16 partnership, the parties used a form written agreement necessary for plaintiffs' bankers (Tr.

²⁸Wright, *supra* note 8 at 778.

²⁹*Id.* at 779.

262) and not reviewed by counsel (Tr. 257-58). The parties carried on extensive oral negotiations that, the evidence reflects, were not intended to be covered by any writing (Tr. 258-59). In the case of the Dakota 14 limited partnership, plaintiffs relied in argument primarily upon the written promises (Tr. 1137-43). The plaintiffs also relied on oral promises, made before and after the written promises. The oral promises, made before the written agreements, were inducements to enter the written agreements, both as to Dakota 14 and Dakota 16. Those made later served to assure plaintiffs, falsely, that the written promises would be fulfilled and constituted reaffirmed agreements. The evidence shows that plaintiffs would not have executed the written agreements as to either Dakota 14 or Dakota 16 but for the oral promises of John McNeal (Tr. 72, 106). The Court of Appeals doubted that McNeal made those promises, but the jury—after lengthy, careful deliberation—decided he did.

The jurors believed Ralph Mueller. Judge Larson appears to believe another group of jurors would also. We draw that inference from his statement, "The Court believes that a new trial would not produce a substantially different result . . ." (A-3). The record cannot adequately depict the differences between Ralph Mueller and John McNeal that led the jury to believe one and not the other. As the case turned upon a conflict of testimony between the two men, those differences—in openness, frankness, demeanor, and candor—must have had controlling significance in determining the outcome of the trial. Judge Larson apparently believes those differences will lead to verdicts for plaintiffs in a new trial if one is required. We do not believe plaintiffs should have to bear the emotion-

al and financial expense it would take to prove that point, simply because the Court of Appeals was swayed by a sharply worded, emotional attack on their credibility.

Until relatively recently, the Court of Appeals for the Eighth Circuit had been considered a bulwark of the "ancient faith" that regarded the appellate court as having a sharply limited role in reviewing decisions on factual issues.³⁰ As long ago as 1957, Charles Alan Wright discerned "signs of wavering" in that Court.³¹ The decision here under review signals full scale abandonment. It places the Court of Appeals for the Eighth Circuit squarely within the camp of those appellate courts that deem their principal task to be that of achieving the "right" result, as they see it, in each case that comes before them.

At a time when the Court of Appeals for the Eighth Circuit almost always turned aside appeals based on factual consideration—Was the verdict too large? Should there have been a new trial? Were the witnesses credible?—that Court consistently received substantially fewer appeals than every other circuit court, except for the First Circuit.³² We doubt that those two facts are unrelated.

The coexistence of those two facts lends weight to the observation, made more than once, that a time-honored, effective way to reduce the backlog of appellate and trial caseloads is to limit the scope of appellate review.³³ We believe such a reduction to be particularly appropriate when, as here, the dispute is between private litigants and "comes to the court of appeals with a double imprimatur"

³⁰Wright, *supra* note 8 at 753. The context of that quotation relates specifically to review of a trial judge's findings as to size of verdict, the subject of the first section of this Petition.

³¹*Id.*

³²Carrington, *supra* note 25, 82 Harv.L.Rev. at 588.

³³Wright, *supra* note 8 at 780.

of a jury verdict and the trial court's order denying a new trial.³⁴

VII.

CONCLUSION

There are significant policy reasons that favor reversal of the decision below, including conflicts among the circuits, fundamental issues relating to the proper relationship of appellate courts to trial judges and juries, problems of compliance with the Seventh Amendment and Rule 52(a), *Federal Rules of Civil Procedure*, granting control of crowded dockets and bringing expensive litigation to a close. There are virtually no negative considerations present in this case, as it involves the results of a jury trial between private litigants who have approximately equal access to the court system.

We submit that the decision of the Court of Appeals herein, if permitted to stand, strikes at the heart of the jury system. It undercuts and usurps the role of the trial judge. It stands for the principle that the Court of Appeals may substitute its judgment on issues of credibility and integrity for those of trial judge and jury. It deprives plaintiffs of the very right to trial by jury that defendant demanded.

The Petitioners request that the Writ of Certiorari issue.

Dated: July 26, 1978.

HYMAN EDELMAN
CHARLES QUAINANCE, JR.
MARTIN G. WEINSTEIN

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³⁴Carrington, *supra* note 25, 3 Ga.L.Rev. at 520.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Ralph E. Mueller and Eugene D. Devane,
Plaintiffs,

vs.

Hubbard Milling Company,
Defendant.

Memorandum and Order

No. 4-75 Civ. 388

Plaintiffs Ralph E. Mueller and Eugene D. Devane, limited partners in two cattle feeding ventures, brought this action against their general partner, Hubbard Milling Company. Plaintiffs sought to recover damages for alleged violations of defendant's fiduciary obligations.

Two counts were submitted to the jury for each plaintiff, one for Dakota Feeders No. 14 Limited Partnership and one for Dakota Feeders No. 16 Limited Partnership. On each count four theories of liability were offered; violations of §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5(c) thereunder, common law misrepresentation and concealment, breach of contract, and breach of fiduciary duty.

The jury found for both plaintiffs on both counts. For

Dakota No. 14, damages were set at \$58,389 and \$23,154 for Mueller and Devane respectively. The awards for Dakota No. 16 were somewhat unusual. Mueller received \$354,000 "+ damages of \$51,000," and Devane was awarded \$62,595 "+ damages of \$9,000." (Quoting from the verdict forms.) Upon receipt of the completed verdict forms, the Court asked the forewoman of the jury whether the additional amounts were to be added to the principal amounts and the reply was in the affirmative.

Defendant now moves for judgment n.o.v. or, in the alternative, for a new trial. Plaintiffs request prejudgment interest on Dakota No. 14 and in the event of a remittitur, prejudgment interest on Dakota #16, and attorneys' fees. The Court is of the opinion that the evidence warranted submission of the case to the jury and that substantial evidence supports the verdicts. The motion for judgment n.o.v. will therefore be denied. On the motion for a new trial defendant claims numerous rulings and instructions by the Court were erroneous and prejudicial. The Court does not believe that the claimed errors warrant a new trial.

Defendants also contend that the jury verdicts were so improper as to reflect passion and prejudice warranting a new trial. It is true that the verdicts for Dakota No. 16 were excessive even without the extra amounts included by the jury. Mueller and Devane asked only for \$219,300 and \$38,700, respectively, which represent the total amount of their investment in Dakota No. 16. Plaintiffs concede that a remittitur to these amounts would be appropriate.

It is impossible to know why the verdicts exceeded the demands, or why the additional amounts were included.

Defendant claims that the jury may have wanted to "stick it" to the defendant, a corporation. This charge is difficult to sustain in view of the low verdicts awarded for Dakota No. 14. Plaintiff Mueller claimed a maximum of \$119,098 but received less than half, \$58,389. Devane received \$23,154, precisely the same proportion of his requested \$47,229. The case was an exceedingly difficult one to comprehend, given the sophisticated financial dealings involved.¹ The jury heard six and one-half days of testimony, argument, and instructions and was referred to well over one hundred exhibits. Deliberations consumed another day and a half. During the course of their deliberations, the jury requested and received a chart of plaintiffs' alternative damage calculations for Dakota No. 14. Under these circumstances, the Court cannot conclude that the verdicts were the result of bias, prejudice, or a reckless disregard of the evidence and instructions. Rather, the mistake appears to be an honest one which can be corrected by remittitur.² The case was tried fairly by able counsel and the Court believes that a new trial would not produce a substantially different result on either Dakota No. 14, or Dakota No. 16 after remittitur.

Plaintiffs' motions for prejudgment interest and for an award of attorneys' fees must be denied.

¹Defendant demanded the jury trial. Plaintiffs did not.

²Defendant contends that even if the jury mistakenly gave plaintiffs more than they requested, no such innocent motive can be attributed to the additional amounts inserted by the jury. Again, it is impossible to know why these extra amounts were added. It is far more plausible, however, that these sums represent compensation for attorneys' fees (as suggested in the post-trial affidavit of plaintiffs' counsel) rather than some form of punitive damages. Plaintiffs did request punitive damages in their complaint but the Court declined to submit the issue to the jury.

ORDER

1. Defendant's motion for judgment n.o.v. is denied.

2. Defendant's motion for a new trial is denied as to Dakota No. 14, and granted as to Dakota No. 16 unless plaintiffs, within fifteen days, *in a writing filed with the Clerk of Court*, remit all damages above the sums of \$219,300 (Mueller) and \$38,700 (Devane). If such remittitur is duly filed, the motion for a new trial is denied in all respects.

3. Plaintiffs' motions for prejudgment interest and attorneys' fees are denied.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

Nos. 77-1413 and 77-1432

Ralph E. Mueller and Eugene D. Devane,
Appellees/Cross-Appellants,
vs.

Hubbard Milling Company,
Appellant/Cross-Appellees.

Appeal and cross-appeal from the United States District
Court for the District of Minnesota.

Submitted: November 18, 1977

Filed: April 10, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY
AND STEPHENSON, Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

Ralph E. Mueller and Eugene D. Devane brought this action in the United States District Court for the District of Minnesota against Hubbard Milling Company (Hubbard) to recover certain investment losses sustained by

them as limited partners in two limited partnership cattle feeding ventures, referred to by the parties as Dakota 14 and Dakota 16, in which Hubbard acted as sole general partner. Following extensive pretrial discovery and a lengthy trial, the cause was submitted to a jury on four theories of liability: federal securities law violations, common law fraud, breach of contract and breach of fiduciary duty. Hubbard's request for special verdict forms was denied, and the jury was instructed to return general verdicts with respect to each of the two plaintiffs and each of the two limited partnerships (a total of four verdicts). Substantial verdicts were returned for plaintiffs in each instance. The Dakota 16 verdicts substantially exceeded the amount sought by plaintiffs and the maximum amount sustainable by the evidence. Plaintiffs later consented to remittiturs on the Dakota 16 verdicts, and judgments were entered on the Dakota 14 verdicts as returned and the Dakota 16 verdicts as remitted. Post-trial relief sought by Hubbard was denied.¹ Alleging numerous grounds for reversal, Hubbard appeals. Plaintiffs cross-appeal from a denial of their claim for prejudgment interest.

For the reasons stated herein, we vacate the judgments entered below, dismiss plaintiffs' cross-appeal without prejudice and remand for further proceedings.

I.

Dakota 14 and Dakota 16 were the last in a series of eight limited partnerships in which Hubbard acted as general partner and plaintiffs as limited partners. All of the partnerships were formed for the purpose of fattening cat-

¹Hubbard did not seek the remittiturs.

tle to slaughter weight at feedlot facilities operated by Fall River Feedlots, Inc. (Fall River), in Hot Springs, South Dakota. Fall River was owned 75% by Hubbard and 25% by T. M. Largent, Fall River's president and manager. Largent was responsible to John McNeal, a vice president of Hubbard, for his actions as feedlot manager. In addition to supervising Largent, McNeal was responsible for Hubbard's performance of its duties as general partner under the partnership agreements. For each limited partnership Largent bought, fattened and sold a herd of cattle; the partnership was then dissolved.

All of the capital in the limited partnerships was contributed by the limited partners; in addition to cash contributions, the limited partners provided letters of credit.² In exchange for its management services, Hubbard received from the partnership a per head fee, which was four dollars for both Dakota 14 and Dakota 16. Hubbard also received a sliding percentage of any profit, ranging from five per cent of the first ten dollars per head profit to twenty per cent of the total profit if it exceeded twenty-four dollars per head.

Mueller and Devane were without question experienced investors. The partnership agreements were modeled after a limited partnership agreement (Dakota 1) offered by the First National Bank of Minneapolis to its customers as part of an investment opportunities package known as "Total Plan." The partnerships provided a significant tax shelter for the limited partners. Mueller at times consulted

²On Dakota 14, Mueller contributed \$65,718 and provided a letter of credit in the amount of \$91,275; Devane contributed \$26,082 and provided a letter of credit in the amount of \$36,225. On Dakota 16, Mueller contributed \$91,800 and provided a letter of credit in the amount of \$127,000; Devane contributed \$16,200 and provided a letter of credit in the amount of \$22,500.

his attorney and his accountant with respect to the investments. In 1972 and 1973 Mueller had also formed and been president of a cattle placement and monitoring business, which purchased about 25,000 head of cattle for its customers.

The partnerships were formed pursuant to the Uniform Limited Partnership Act as enacted in South Dakota, South Dakota Compiled Laws Annotated, chapter 48-6 (1967). The agreements recited that they "shall be construed and enforced in accordance with the laws of the State of South Dakota."

Paragraph 8 of the agreements vested exclusive management of the partnerships in Hubbard; Hubbard was authorized, *inter alia*:

- (a) to purchase, hold and sell cattle;
- (b) to engage, at its discretion, in "hedging" activities including advance contracting and commodities futures trading in cattle, and to utilize Partnership assets in an amount not to exceed \$10 per head of Partnership cattle owned at the time of such hedging activities to cover the costs thereof;
- (c) to borrow money from such person or persons in such manner, on such security (including assets of the Partnership and assets pledged to the Partnership) and on such terms as it may see fit, provided that such borrowings must be made without recourse to the Partnership or to any Partner [.]

Paragraph 17 provided: "No Limited Partner shall participate in the control, operation or management of the Partnership business" and "The Limited Partners hereby con-

sent to any purchase or other acquisition, sale, lease, exchange, conveyance or other disposition, mortgage or other encumbrance by the General Partner on behalf of the Partnership, of any or all property now or hereafter acquired for the Partnership, on such terms and conditions as may be determined by the General Partner, notwithstanding that any party hereto may have an interest therein."

At the risk of oversimplification and without attempting to relate all or even most of the relevant evidence, we outline the particular events which gave rise to this lawsuit. Although the agreement for Dakota 14 was executed prior to the one for Dakota 16, the dispute over Dakota 16 developed first, and we accordingly discuss it first.

In the feeder cattle business, the term "breakeven" refers to an estimated price at which cattle must be sold in order to "break even" with the original purchase expense and the cost of feeding. The central controversy over Dakota 16 concerns statements allegedly made by McNeal that Hubbard would notify plaintiffs before purchasing any cattle at breakevens higher than forty-five cents per pound.

Prior to October 15, 1973, Mueller, according to his own testimony, was reluctant to form Dakota 16 because of difficulties then being encountered with Dakota 14 and its immediate predecessor, Dakota 12. Discussing the matter with McNeal, he explained, "we just can't buy ourselves into another loss position." In the course of negotiations, McNeal allegedly made a number of statements which induced plaintiffs to execute the agreement. Most

significantly,³ he "agreed that if we would go into this partnership that he would call us before any cattle were purchased if they were above 43 or 45 cents, if they were above the 45-cent range."

The Dakota 16 agreement was executed on October 15, 1973. Paragraph 5 recited: "The Partnership shall purchase an aggregate of 2,000 feeder cattle and calves during the period from November 1, 1973 through February 14, 1974 and shall market the fattened cattle in lots during the period of March through August of 1974."

On November 12, 1973, Hubbard transferred to Dakota 16 417 head of cattle which Fall River had previously purchased, some of them in early October. Mueller and Devane did not learn of the transfer until November 27. Upon learning of the transfer, Mueller called McNeal to express concern over Hubbard's transferring cattle purchased before the Dakota 16 agreement was executed, and more especially, over the fact that the 417 cattle had been purchased at breakevens of forty-seven cents. He explained that the purchase would cause him to have trouble with his banker because his banker had loaned him the money for Dakota 16 on the basis that purchases would be at breakevens of forty-three to forty-five cents. Mueller testified that McNeal told him "they wouldn't do any more [purchasing] without talking to us."

No additional cattle were purchased for or transferred to Dakota 16 in November or December. However, Hubbard did purchase an additional 1,516 head of cattle, all

³Among other statements allegedly made at this time are the following: McNeal allegedly stated that other persons were anxious to take space in the feedlot if plaintiffs decided not to proceed; this statement allegedly was false. McNeal allegedly stated that "things would get better after the first of the year"; Largent allegedly stated that Dakota 16 would be "a real barn burner."

at breakevens in excess of forty-five cents, at various times in January. Mueller testified he did not learn of these purchases until January 31.

Declining fat cattle prices, rising feed prices and other factors combined in making Dakota 16 a financial disaster. Hubbard sold the cattle on advance contract in June 1974. Mueller and Devane lost their entire investment, which amounted to \$258,000. This sum is the total amount of the verdicts as remitted on Dakota 16.

The Dakota 14 agreement was executed on July 31, 1973. Paragraph 5 recited: "The partnership shall purchase an aggregate of 3,000 feeder cattle and calves during the period of August through October of 1973, and shall market the fattened cattle in lots during the period of January through April of 1974." The dispute over Dakota 14 concerns certain second letters of credit delivered by plaintiffs in December 1973. As already noted, *supra* note 2; plaintiffs had delivered first letters of credit at the time the partnership was formed.

The purchase and feeding of Dakota 14 cattle was financed through the First National Bank of the Black Hills. Under the financing agreement the bank had authority, at any time its loans exceeded 80% of the value of its collateral, to direct that the partnership's cattle—collateral on the loans—be sold. By early December 1973 Dakota 14 had acquired about 2752 head of cattle, the value of which had diminished with declining slaughter cattle prices. Concomitantly, increasing feed costs had necessitated greater loans from the bank than originally had been expected. As a result, on December 12, the bank, pursuant to its contractual authority, instructed Hubbard to sell the Dakota 14 cattle.

A December sale of the cattle would have resulted in a loss to the partnership of about \$102 per head. Because of a belief that slaughter cattle prices would rise beginning in January, alternatives to the forced sale were sought. Testimony was adduced that the bank was willing to accept a guarantee from Hubbard in lieu of the sale and that Hubbard refused this offer. Plaintiffs contend this fact was fraudulently concealed from them.⁴ In any event, Hubbard did advise plaintiffs: "The one alternative that the bank has offered to the Partnership is for the Limited Partners to provide an additional \$197,000 in irrevocable letters of credit to be pledged to the bank as collateral to the loans."

Late in December plaintiffs did provide second letters of credit, Mueller in the amount of \$79,920 and Devane in the amount of \$31,718; also late in December the parties executed a "Memorandum Supplementing Limited Partnership Agreement" (the Supplementing Agreement). This agreement explained the problem that had developed with the bank, recited that Mueller and Devane thereby agreed to contribute to the partnership second letters of credit in the respective amounts noted above, and purported to set forth the understanding of the parties with respect to the second letters of credit. The events which attended the execution of these documents, and the sequence in which the events occurred, are the subject of much dispute.

⁴Plaintiffs also contend that Hubbard fraudulently concealed from them the fact that the bank was requiring a compensating balance for its loans to Dakota 14. This arrangement allegedly had the effect of raising the interest rate on the loans from ten per cent to twelve per cent. Plaintiffs further contend that the arrangement "raised a possible usury problem" under South Dakota law and that Hubbard breached its fiduciary duty to plaintiffs by failing to investigate this alleged problem.

Part of the dispute can be traced to the fact that the second letters of credit bear the dates December 18 and 20⁵ while the Supplementing Agreement bears the dates December 28 and 31.⁶ These dates are of some significance because of certain alleged communications on December 24 and 26.

According to Mueller's testimony, he called McNeal on December 24 to express his reluctance to go through with the second letters of credit because of the amount of money involved and the then-current cattle prices. This conversation was followed by a visit by Mueller to McNeal's office on December 26. Mueller described the substance of the December 26 meeting as follows:

Well, the substance again is that we were reluctant to sign this supplement and come up with the additional letters of credit and our thought was that there would be a possibility of putting in some safeguard in in which there would be—I guess you could call it a form of stop-loss agreement for this second letter of credit. So we discussed the approach to this, and which I had discussed with my attorney. We discussed the approach to it and then John McNeal also said that he felt that, again that this cattle price thing was going to straighten out after the first of the year and that 14 would be all right. I said, well, this is fine, but we sure don't want to lose this second letter of credit because we had already lost a lot of money obviously on 12 and that we were concerned

⁵The letters of credit recite: "Effective December 18, 1973" and "Dated: December 20, 1973."

⁶The Supplementing Agreement was signed by McNeal for Hubbard on December 28 and by Mueller and Devane on December 31.

about this. So we talked then about putting in a stop-loss provision or a provision in this that they would sell out this partnership to limit our loss to \$100. per head, because what we were really doing by going into the second letter of credit, that we would lose considerably more than \$100. a head, I think between \$150 and \$160. a head or more. So our concern was let's at least limit our exposure. Mr. McNeal, John said he thought they could do that and he would talk with their counsel and that they would see what they could do to get us a revised contract.

Then we talked about putting in some guarantee that this would happen. John McNeal said, well, he really didn't like to do this because it really fouled up the lawyers to ask them to write all these things in, but that they would really watch out for us.

Mueller further testified that McNeal said "he would take care of the situation, assured me that they would really do their best to really do this and to really take care of the situation so that we wouldn't lose more than \$100."

The Supplementing Agreement executed by the parties contained the following "best efforts" clause:

In order to attempt to minimize losses for Limited Partners in Dakota Feeders #14, the General Partner agrees to use its best efforts to attempt to advance contract for the sale of the Partnership's cattle when futures prices fall to the levels set forth below. It is understood, however, that advance contracting can be done only if packers are willing to buy cattle at a fixed price for a future delivery date. * * * * Since futures markets are sometimes very erratic, it may be

impossible at time for the General Partner to effectively advance contract for the sale of any cattle. If, however, such a sale is possible, the following guidelines will be followed by the General Partner in determining when specific pens of cattle should be offered to packers for advance contracting. For pens Nos. 86, 14, 83, 73, 77, 51, 91 and 5, the General Partner agrees to use its best efforts to attempt to hold losses to \$100 per head by advance contracting according to the guidelines set forth below [.]

The agreement made clear throughout, however, that Hubbard was not insuring plaintiffs against loss of their additional investments. It recited:

The Limited Partners understand that the General Partner makes no representations as to the specific amounts of any loss per head on any specific pen pursuant to the above arrangement. The Limited Partners also understand that the General Partner's obligations under this arrangement are only to use its best efforts and that an advance contract sale at any time may not be possible.

The agreement also set forth the following conspicuous limitations:

EACH LIMITED PARTNER SHOULD UNDERSTAND THAT NEITHER THE PARTNERSHIP NOR THE GENERAL PARTNER HAS ANY BASIS FOR DETERMINING THE FUTURE MARKET PRICES FOR SLAUGHTER CATTLE. IF PRESENT PRICES SHOULD DECLINE, EACH LIMITED PARTNER MAY LOSE ALL OR A PART OF THE ADDITIONAL LETTER OF CREDIT TO BE CONTRIBUTED BY HIM.

NEITHER THE PARTNERSHIP NOR THE GENERAL PARTNER MAKES ANY ASSURANCE THAT SLAUGHTER CATTLE PRICES WILL INCREASE DURING THE PERIOD BETWEEN THE DATE HEREOF AND THE SCHEDULED MARKETING DATES. THERE IS IN FACT THE POSSIBILITY THAT SLAUGHTER CATTLE PRICES COULD BE LOWER ON SUCH DATES. SHOULD SUCH PRICES BE LOWER THAN THE PRESENT ESTIMATE ADVANCE CONTRACT PRICES USED TO CALCULATE THE LOSSES DESCRIBED ABOVE, THE LIMITED PARTNERS LOSSES WOULD BE HIGHER THAN CALCULATED ABOVE.

Slaughter cattle prices did rise in January 1974, but they fell during the following months. Mueller testified that he asked McNeal several times in January to advance contract the cattle, and it appears to be undisputed that losses would have been held to less than \$100 per head if the cattle had been advance contracted in January. The evidence is, to say the least, disputed as to whether Hubbard made bona fide efforts to advance contract the cattle early in the year.

In the end, according to Mueller's testimony, the partnership lost about \$155 per head, a sum which represented the plaintiffs' entire initial investment in Dakota 14 and approximately half the amount of the second letters of credit. The jury returned verdicts on Dakota 14 for Mueller in the amount of \$58,389 and for Devane in the amount of \$23,154. As indicated above, judgment was entered on these verdicts.

II.

Hubbard contends, *inter alia*, that the district court's admission into evidence of testimony by Mueller concerning oral communications between Mueller and McNeal was erroneous and prejudicial with respect to the contract claims on both Dakota 14 and Dakota 16. We agree with Hubbard that as to the contract claims the testimony should have been excluded under the parol evidence rule.

Hubbard first objected to the alleged parol evidence early in the trial. At that time the trial court overruled the objection and indicated that it would not give a requested instruction limiting the jury's consideration of the evidence to the fraud claims;⁷ Hubbard was granted a continuing objection. The objection was reasserted in Hubbard's motions for directed verdicts at the close of the plaintiffs' evidence and the close of all of the evidence and again in Hubbard's post-trial motion for judgment notwithstanding the verdict.

It will be recalled that the Dakota 14 and Dakota 16 agreements recite that they "shall be construed and enforced in accordance with the laws of the State of South Dakota." Under well-established principles, questions of substantive law concerning the construction and enforcement of the agreements are accordingly governed by South Dakota law. *Restatement (Second) of Conflict of Laws*

⁷The importance of Hubbard's request for a limiting instruction and of the trial court's refusal to give it cannot be over-emphasized. The result we reach might be different if Hubbard had not made the request or if the trial court had granted it.

§187 (1969).⁸ It is also well-established that the parol evidence issue before us is one of substantive law and falls within this rule. "Whether a contract is integrated in a writing and, if so, the effects of integration are determined by the local law of the state selected by application of the rules of §§187-188." *Id.* §140. *Accord: Schewe v. Bentsen*, 424 F.2d 60, 62 (5th Cir. 1970); *Merchants Nat'l Bank & Trust Co. v. Professional Men's Assn.*, 409 F.2d 600, 602-03 (5th Cir. 1969); *Kirtley v. Abrams*, 299 F.2d 341, 345 n.6 (2d Cir. 1962); *Long v. Morris*, 128 F.2d 653, 141 A.L.R. 1041 (3d Cir. 1942); *Annot.*, 141 A.L.R. 1043 (1942). The rationale behind *Restatement* Section 140 is both simple and sound: "Rules which determine when a contract is integrated should be determined by the law which governs the contract. Such rules are not concerned primarily with judicial administration . . . and may affect substantially the obligations of the

⁸*Restatement* Section 187 in substantial part reads:

- (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
- (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
 - (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
 - (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

On the facts of this case, there is no basis for upsetting the parties' choice of South Dakota law.

parties under the contract." *Restatement* §140, Comment c. We accordingly apply South Dakota rather than Minnesota law in resolving the parol evidence question.⁹

In South Dakota the parol evidence rule is of statutory origin: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." S.D. Compiled Laws Ann. §53-8-5 (1967). A related statute governs oral communications occurring after a written contract is executed: "A contract in writing may be altered by a contract in writing without new consideration or by an executed oral agreement, and not otherwise." S.D. Compiled Laws Ann. §53-8-7 (1967).

The South Dakota Supreme Court has authoritatively construed Section 53-8-5 as follows:

[W]here a contract which has been reduced to writing and executed by the parties is complete, clear and unambiguous in its terms and contains mutual contractual covenants, or where the consideration consists of a specific and direct promise to do or not to do certain things, this part of the contract, in the absence of fraud, mistake, or accident, cannot be

⁹Under the rule of *Klaxon Company v. Stentor Electric Manufacturing Company, Inc.*, 313 U.S. 487 (1941), we must of course apply Minnesota conflict-of-laws rules with respect to the state law contract claims before us. Our research does not disclose that the Minnesota Supreme Court has had occasion to consider the principle stated in *Restatement* Section 140. However, Section 140 is premised upon the widely accepted view that the parol evidence rule is a rule of substantive law, a premise with which the Minnesota Supreme Court agrees. *Anchor Cas. Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 82 N.W.2d 48, 54 (1957). In the absence of any contrary indication, we accordingly conclude that the Minnesota Supreme Court would, if confronted with the issue, agree with *Restatement* Section 140.

changed or modified by parol or extrinsic evidence, nor can new terms be added to the contract, nor to the contractual consideration therein expressed, nor, where all these facts exist, may a party to a contract show that he was induced to sign the contract by the making of a prior or contemporaneous oral agreement, where such showing would be tantamount to adding to or subtracting from the contractual consideration expressed in the written contract.

Baker v. Jewell, 77 S.D. 573, 96 N.W.2d 299, 301-02 (1959); *Kindley v. Williams*, 76 S.D. 225, 76 N.W. 2d 227, 229-30 (1956). In the absence of fraud, mistake or accident, it is presumed that the written agreement expresses the final intention of the parties upon the subject matter of the contract. *Northwestern Pub. Serv. Co. v. Chicago & N.W. Ry. Co.*, 87 S.D. 480, 210 N.W.2d 158, 160 (1973).

Although some aspects of the parol evidence rule are, in South Dakota and elsewhere, recurring sources of controversy, it is well-established that oral negotiations or agreements which preceded execution of a written contract may not, at least ordinarily, be employed to contradict and nullify its express terms. *Eggers v. Eggers*, 79 S.D. 233, 110 N.W.2d 339, 342 (1961); *Kindley v. Williams*, *supra*, 76 N.W.2d at 230. And in South Dakota the same rule is statutorily prescribed with respect to unexecuted oral agreements made *after* execution of a written contract. S.D. Compiled Laws §53-8-7 (1967), quoted *supra*.

Turning first to the Dakota 16 controversy, we conclude that the challenged parol evidence is inconsistent with the written partnership agreement. Mueller was permitted to

testify to statements allegedly made by McNeal that McNeal would call plaintiffs before purchasing any cattle at breakevens higher than forty-five cents per pound. Paragraph 5 of the written agreement provided that the partnership "shall purchase" an aggregate of 2,000 feeder cattle and calves, and paragraph 8 vested exclusive management authority in Hubbard. Most significantly, paragraph 17 specified: (1) "No Limited Partner shall participate in the control, operation or management of the Partnership business"; and (2) "The Limited Partners hereby consent to any purchase . . . by the General Partner on behalf of the Partnership, of any or all property now or hereafter acquired for the Partnership, *on such terms and conditions as may be determined by the General Partner . . .*" (Emphasis supplied). These provisions make abundantly clear that under the agreement as written Hubbard had no contractual obligation to purchase cattle at any particular price. Mueller's testimony, which purported to establish that Hubbard did have such a contractual obligation, directly contradicted the writing and should accordingly have been excluded insofar as plaintiffs' contract claims are concerned.

We reach the same conclusion with respect to the Dakota 14 contract claims. The critical dispute on these claims concerns the "best efforts" clause contained in the December 1973 Supplementing Agreement. Again, the pertinent portions of Mueller's testimony and the pertinent provisions of the written agreement, both of which are set out in considerable detail *supra*, are fundamentally inconsistent.

Mueller was permitted to testify about discussions he allegedly had with McNeal in which the two of them con-

sidered inserting a "stop-loss" or "guarantee" provision in the agreement to the effect that plaintiffs would not lose more than one hundred dollars per head on their Dakota 14 investments. This testimony could well have left the jury with the impression that McNeal had promised Mueller everything short of an actual guarantee, and indeed, that the only reason the written agreement did not in terms contain a guarantee was that "it really fouled up the lawyers to ask them to write all these things in." The written agreement, of course, contained no guarantee, but it did contain the "best efforts" clause. If the agreement were otherwise silent as to the intended meaning of the words "best efforts", plaintiffs might convincingly argue that Mueller's testimony would be admissible for the purpose of explaining, in consistent additional terms, the intended meaning of the uncertain or ambiguous words "best efforts." But that is not the issue before us, and we do not pass on it.¹⁰

In determining whether language in a written contract "is reasonably capable of being understood in more than one sense" and therefore susceptible to interpretation by parol, the courts will not examine the contractual provisions in isolation. *Ponderosa-Nevada, Inc., v. Venners*, 243 N.W.2d 801, 804 (S.D. 1976). "It is a fundamental rule of contract construction that the entire contract and each and all of its parts and provisions must be given meaning if that can consistently and reasonably be done."

¹⁰Compare *Dail v. Vodicka*, 237 N.W.2d 7, 9 (S.D. 1975), and *Habeck v. Sampson*, 221 N.W.2d 483, 486-87 (S.D. 1974), (language of written contract ambiguous or uncertain), with *Eggers v. Eggers*, *supra*, 110 N.W.2d at 341-42, and *Hobbs v. Whitelock*, 57 S.D. 198, 231 N.W. 904, 907 (1930), (language of written contract not ambiguous or uncertain). See generally 30 Am.Jur. 2d *Evidence* §§ 1069-71, 1074 (1967).

Id. Here, the Supplementing Agreement was *not* otherwise silent as to the intended meaning of the words "best efforts." Rather, it stated in numerous places, twice in conspicuous language, that Hubbard was in no position to predict future cattle prices and that plaintiffs' losses could be substantial. It also cautioned that advance contracting of cattle might not be possible. In short, it made clear that the venture was a risky one. Thus, the written agreement as a whole necessarily foreclosed the possibility that "best efforts" could be understood or construed to mean anything even remotely approximating a guarantee. See *id.* For that reason the agreement should have spoken for itself, and Mueller's testimony should have been excluded insofar as plaintiffs' contract claims are concerned.

Plaintiffs seek to avoid application of the parol evidence rule by suggesting, first, that Mueller's testimony is admissible to establish the existence of an oral agreement that is collateral to the written agreement, and second, that Mueller's testimony is admissible to establish the consideration for the written agreement. A collateral oral agreement will not, however, suffice to avoid application of the parol evidence rule where it is, as here, inconsistent with the written contract. *Eggers v. Eggers*, *supra*, 110 N.W.2d at 342; *Moncur v. Jones*, 72 S.D. 202, 31 N.W.2d 759, 764-65 (1948); *Barnes v. Hill City Lumber Co.*, 34 S.D. 158, 147 N.W. 775, 777 (1914); *In re Roberts*, 358 F. Supp. 392, 396-97 (D.S.D. 1973) (applying South Dakota law); 30 Am.Jur. 2d *Evidence* §1049 (1967). As to the consideration theory, the South Dakota Supreme Court held in *Farmers' Elevator Co. v. Swier*, 50 S.D. 436, 210 N.W. 671, 673 (1926):

One exception [to the parole evidence rule] frequently invoked is that recitals as to the consideration of a written instrument are not conclusive, and that it is competent to inquire into the consideration and show by parol or other extrinsic evidence what the real consideration was. This exception, however, has no application where the statement in a written instrument as to consideration is of a contractual nature and consists of a specific and direct promise to do certain things.

See also *Independent Harvester Co. v. Anderson*, 45 S.D. 60, 186 N.W. 112, 114-15 (1921).

There can be little doubt that the admission of parol evidence on both the Dakota 14 and Dakota 16 contract claims was not only erroneous but also prejudicial. Even with the parol evidence, Hubbard presented a strong defense to the contract claims, and plaintiffs' counsel pointedly emphasized the pivotal nature of the parol testimony during closing argument. We cannot, therefore, deem the error harmless.¹¹

We point out that it is well-established in South Dakota that parol evidence is admissible to prove fraud;¹² in cases where fraud is proved, however, the proper remedy is voiding the contract or damages for fraud, not recovery on the contract. *Sabbagh v. Professional & Business Men's*

¹¹It is questionable whether, had the trial court properly excluded the parol evidence as to the contract claims on Dakota 16, sufficient evidence would have remained to warrant submission of those claims to the jury. Because we conclude that a reversal is necessary, however, we do not resolve this issue. If the case is retried, the district court will of course be free to consider it.

¹²The South Dakota Supreme Court has in this context rejected the distinction between fraud in the execution and fraud in the inducement and allows parol evidence to prove either. *Baker v. Jewell*, *supra*, 96 N.W.2d at 303-04.

Life Ins. Co., 79 S.D. 615, 116 N.W.2d 513, 520-21 (1962); *Baker v. Jewell*, *supra*, 96 N.W.2d at 302-03. While the parol evidence here is admissible to prove fraud, it remains inadmissible to prove breach of contract. *Baker v. Jewell*, *supra*, 96 N.W.2d at 303. As already noted, an appropriate limiting instruction was requested and refused. See note 7, *supra*.

III.

There remains for consideration the troublesome issue of what effect the erroneous and prejudicial admission of parol evidence on the contract claims should have on the general verdicts returned by the jury. On the facts of this case, we conclude that the verdicts must be set aside.

As noted at the outset of this opinion, Hubbard requested a special verdict by which the jury could have made known which theory or theories of liability were supported by the evidence. The request was denied.¹³ Instead, the cause was submitted to the jury under the following general instruction, as requested by the plaintiffs:

Plaintiffs have set forth a single set of facts, with four legal theories each as to why the evidence entitles

¹³It is settled that submission of a special verdict to a federal jury is a matter of procedure governed by the federal rules and not by state practice. *Lowery v. Clouse*, 348 F.2d 252, 260 (8th Cir. 1965). Under Rule 49(a), Fed.R. Civ.P., submission of a special verdict is permissive and not a matter of right, and it is discretionary with the trial court. *Id.*, 5A J. Moore *Federal Practice* ¶ 49.03[1] at 2208 (1977).

We do not hold that the trial court's refusal to submit the special verdict here was an abuse of discretion, much less that such refusal by itself constituted reversible error. But we do suggest that cases such as this, where multiple theories of liability are asserted, are the ones most suited to the use of special verdicts, because special verdicts will often obviate the necessity of deciding difficult legal questions which are not essential to an appropriate disposition of the controversy.

them to relief from some or all of their losses in connection with Dakota 16 and Dakota 14. Those theories, about which I will soon give you more detailed instructions, are: breach of contract, breach of fiduciary duty, misrepresentation and concealment, and a fraudulent course of conduct in connection with a sale of securities. If you determine that the plaintiffs are entitled to recover on any of these theories in connection with Dakota 16 or Dakota 14, you will then determine the damages of each plaintiff in accordance with the instructions I shall give you and render a verdict for plaintiffs in the amount you determine is proper. If you find that the plaintiffs are entitled to relief on none of the theories they assert, then you will render verdicts for the defendant.

The insurmountable difficulty is that the general verdicts returned by the jury under this instruction may rest solely upon the contract claims, which are tainted with the trial court's erroneous and prejudicial admission of parol evidence.

A similar problem was recently analyzed by Judge Friendly for the Second Circuit in *Morrissey v. National Maritime Union*, 544 F.2d 19 (2d Cir. 1976). At issue in that case were, *inter alia*, distinct claims under Sections 101(a)(2) and 101(a)(5) of the Landrum-Griffin Act, 29 U.S.C. §§411(a)(2) & 411(a)(5). After concluding that the district court had erred in submitting the Section 101(a)(5) claim to the jury, the Second Circuit went on to hold that a general verdict on the two claims could not stand. We quote a substantial portion of the analysis:

The general rule is that when one of the two claims

that have been submitted to the jury should not have been submitted, a general verdict, such as was rendered here on the LG [Landrum-Griffin] claims cannot stand. *United New York and New Jersey Sandy Hook Pilot Ass'n v. Halecki*, 358 U.S. 613, 619, 79 S. Ct. 517, 520, 3 L.Ed. 541 (1959); *Patton v. Wells*, 121 F. 337, 340 (8th Cir. 1903); *Fatovic v. Nederlandsch-Ameridaansche Stoomvaart*, 275 F.2d 188, 190 (2 Cir. 1960). The language used is generally quite absolute ("a new trial will be required, for there is no way to know that the invalid claim . . . was not the sole basis for the verdict"—*Halecki*. "[s]ince we cannot determine from the general verdict . . . whether they relied upon a proper or improper claim . . . we must reverse the judgment and order a new trial"—*Fatovic*). However, a few recent cases have disregarded the error when the appellate court was fairly convinced that the jury proceeded only on the sound ground. In *Colum v. Butler*, 421 F.2d 1257 (7 Cir. 1970), a §1938 action for police brutality, the trial court charged that recovery might be had if the police had beaten the plaintiff or had kept him from contacting counsel or family. The court of appeals held that §1983 would not cover the latter point, in the absence of unusual circumstances not there shown, but that plaintiff's judgment should be affirmed. The dominant issue at trial had been the physical abuse, and that was the only issue on which damages had been proven; the other issues had been of "such relative insignificance" that the result "would not have been substantially affected if these issues had not been

submitted," 421 F.2d at 1260. *Gardner v. General Motors Corp.*, 507 F.2d 525, 529 (10 Cir. 1974), is to much the same effect. See also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 837-38 (2 Cir. 1967).

Assuming these cases to have been soundly decided, we think the qualification on the general rule of *Halecki* and other cases must be kept within rather strict bounds. Here we find no sufficient basis for confidence that the verdict on the LG count would have been rendered, and particularly that the same verdict would have been rendered, if the complaint under §101(a)(5) had not been submitted.

544 F.2d at 26-27 (citations omitted in part).

We are in agreement with the above analysis, which is decisive here. First, there is no material distinction between a situation, like that in *Morrissey*, in which one of several theories of liability should not have been submitted to a jury at all, and a situation, like that here, in which one of several theories of liability is not sustainable because of an erroneous and prejudicial admission of evidence. The essential inquiry in either case is whether the appellate court is fairly convinced that the jury proceeded on a sound basis. Second, we are unable to say with any confidence that the verdicts returned below rested on anything other than the contract claims. Plaintiffs' counsel stated in closing argument: "Our principal focus has been on the contract claims, the promises that John McNeal made . . ." A careful review of the record convinces us that all of plaintiffs' theories were of marginal validity at best and that the contract theory might well have provided the sole basis for the verdicts.

IV.

What has heretofore been said is sufficient in itself to warrant a new trial on all issues. We are also of the view that the trial court erred in not granting a new trial on all issues on the ground that the verdicts were the result of passion and prejudice on the part of the jury. Such issue was raised by timely motion for new trial.

The trial court points out that on Dakota 16 plaintiffs concede that Mueller and Devane asked for only \$219,300 and \$38,700 respectively, which represents the total amount of their investment in Dakota 16 and that no proof was offered in support of any greater amount. The verdicts exceed the amounts claimed by Mueller and Devane by \$186,400 and \$32,895 respectively. The court denied a mistrial as to Dakota 14 but granted a new trial as to Dakota 16 unless remittitur down to the amount claimed was filed. Such remittitur was filed.

The trial court states that it is impossible to know why the jury awarded such grossly excessive verdicts. We agree. The court ultimately determined that the excessive verdicts were not the result of bias, prejudice or reckless disregard but were due to an honest mistake and that the error could be corrected by remittitur to the maximum amount claimed. We do not agree with such determination. The large excess in itself and the absence of any plausible explanation therefor clearly points to bias and prejudice on the part of the jury. Such conclusion is strengthened by the fact that the jury not only filled in the appropriate verdict blanks with an excessive amount but added in writing "plus damages of \$51,000" as to Mueller and "plus damages of \$9,000" for Devane. There is nothing in the court's instructions or the evidence which would

warrant adding the plus amounts to the verdicts. The issue of punitive damages was not submitted to the jury. Such added damages in our view can only be explained on the basis of bias, passion or prejudice on the part of the jury.

We recognize that in many situations excessive verdicts can be cured by an appropriate remittitur. However, we cannot say under this record that an impartial jury, in event it found liability, would award the full amount claimed by the plaintiffs on Dakota 16.

The jury's award on the Dakota 14 claim was well within permissible limits. Plaintiffs have not made out a strong case of liability on either Dakota 14 or 16. Both claims were tried to the same jury. The passion and prejudice which led to the grossly excessive verdict on Dakota 16 may well have influenced the jury on the liability issues on both Dakota 14 and 16.

Accordingly, the verdicts returned below are set aside and the judgments entered on those verdicts are vacated. Plaintiffs' cross-appeal seeking prejudgment interest is dismissed without prejudice. The cause is remanded to the district court for further proceedings not inconsistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 77-1413

Ralph E. Mueller and Eugene D. Devane,
Appellees,

vs.

Hubbard Milling Company,
Appellant.

No. 77-1432

Ralph E. Mueller and Eugene D. Devane,
Appellants.

vs.

Hubbard Milling Company,
Appellee.

Appeal and cross-appeal from the United States District
Court for the District of Minnesota.

JUDGMENT

September Term, 1977

These causes were heard on the record of the United States District Court for the District of Minnesota and were argued by counsel.

On Consideration Whereof, it is now here ordered by this Court that the verdicts of the said District Court are set aside and the judgments of the District Court entered on those verdicts are vacated.

It is further ordered by this Court that plaintiffs' cross-appeal seeking prejudgment interest is dismissed without prejudice.

And it is further ordered by this Court that these causes are remanded to the said District Court for further proceedings not inconsistent with this Court's opinion.

April 10, 1978.

APPENDIX D

United States Court of Appeals For the Eighth Circuit

No. 77-1413 and 77-1432

Ralph E. Mueller, et al.,
Appellees, Cross-Appellants,
vs.

Hubbard Milling Company,
Appellant, Cross-Appellee.

September Term, 1977

Appeals from the United States District Court for the District of Minnesota

The Court having considered petition for rehearing en banc filed by counsel for appellees/cross-appellants, Ralph E. Mueller et al., and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 2, 1978.